



May 15, 2019

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Comment Proposed Policy on Payday, Vehicle Title, and Certain High-Cost Installment Loans
Docket No. CFPB-2019-0006

To Whom It May Concern:

The Ohio Credit Union League (OCUL) welcomes the opportunity to submit comments concerning the Consumer Financial Protection Bureau's (CFPB) request for comment regarding the proposed rescission of certain provisions of the 2017 Payday, Vehicle Title, and Certain High-Cost Installment Loans rule (known as the Small Dollar Loan Rule).

As the state trade association representing Ohio's 264 credit unions and their more than three million members, we work collaboratively with various other state and national associations to help create a strong and efficient credit union operating environment. The efficient operating environment our credit unions require is largely influenced by federal agencies and consumer protection regulations, which is why revising and/or rescinding certain mandatory underwriting requirements in the Small Dollar Loan Rule is of significance to Ohio's credit unions.

We appreciate the agency for recognizing that entities not only have to comply with federal laws and regulations, but also state laws and regulations, which can be time consuming and require considerable resources. In fact, Ohio is one of the states referenced in the rule proposal that has enacted a payday lending law, the Ohio Fairness in Lending Act. This law became effective in the fall of 2018, and new loans made after April of 2019 must comply with the new requirements.

While the CFPB recognizes that credit unions provide alternative products to payday lending, including those offered under the National Credit Union Administration's Payday Alternative Loan regulation, credit unions still remain affected by the agency's Small Dollar Loan Rule. As such, OCUL is highly supportive of critically analyzing the legal and evidentiary foundation for the Small Dollar Loan Rule.

Ability to Repay Requirements

The Small Dollar Loan Rule, effective January 16, 2018, included a majority of provisions, like the underwriting requirements at issue presently, with a mandatory compliance date of August 19, 2019. In the final rule, the rule defines as an unfair and abusive practice a lender making covered short-term loans or covered balloon-payment loans without reasonably determining the consumer has an ability to repay. In order to fall outside of an unfair and abusive practice, the lender must follow specific underwriting requirements established by the agency.

Under the Obama Administration, former Director Cordray finalized the 2017 Small Dollar Loan Rule. In a change of administration, Director Kraninger proposes to rescind portions of the rule. At the crux of the issue is whether there was robust and reliable evidence to support the need for the ability to repay (ATR) requirements. On one side of the issue, advocates believe that ATR requirements will ensure consumers have the appropriate means to purchase a financial product, specifically a payday loan. On the





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other side of the issue, other advocates believe that ATR requirements will eliminate the payday industry altogether decreasing the available credit for low-income individuals.¹

With the confusion that exists regarding the potential impact of the rule and uncertainty regarding the supporting evidence of the rule, it is appropriate for the agency to rescind the ATR provisions. More so, it is our position that the CFPB exceeded the authority in the Administrative Procedures Act (APA) and the Consumer Financial Protection Act (CFPA) when it enacted the 2017 Small Dollar Rule Loan.

The APA governs the way administrative agencies may propose and subsequently establish regulations.² Further, the APA allows for judicial review of final agency action, outlining numerous circumstances in which a court may hold an agency action as unlawful. If a court finds the agency action, finding, and/or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the APA states the court may set aside the agency action.

Thus, under this administrative law scheme, entities have sued the CFPB arguing the Small Dollar Loan Rule is arbitrary and capricious.³ The 2010 CFPA includes the ability for the CFPB to regulate unfair, deceptive, and abusive acts and practices. However, the “Bureau shall have no authority...to declare an act or practice...to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that A)the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”⁴ Further, when exercising its rulemaking authority, by statute, the CFPB must engage in a cost-benefit analysis by considering “the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products.”⁵

Based on APA and the CFPB, we believe the following actions taken by the CFPB conflict with the APA and/or CFPA:

- Undergoing de-minis research to support the rule, resulting in minimal statistical evidence;
- Failing to complete a robust cost-benefit analysis;
- Neglecting to investigate other alternatives (under state law and other federal agencies) which would indicate an option for consumers to navigate and/or avoid predatory loans; and,
- Arbitrarily and capriciously deciding ATR requirements should be applied to a small dollar loan typically used to meet basic living expenses indicating an obvious inability to immediately repay.

Conclusion

OCUL supports the agency’s rule proposal to eliminate the ATR requirements. Additionally, we urge the agency to take a holistic look at the Small Dollar Loan Rule, which may require additional revisions or entire elimination. Engaging in this type of thoughtful analysis and industry collaboration which addresses the legal authority, costs, benefits, and external burdens like overlapping state laws will move

¹ This situation is illustrated in the following news articles where both sides of the issue rely on the same payday lending data to support their positions. *See*, Republicans and Democrats cite the same Federal Reserve data in high-stakes debate on payday lenders, MarketWatch, *available at* <https://www.marketwatch.com/story/republicans-and-democrats-cite-the-same-federal-reserve-data-in-heated-debate-on-payday-loans-2019-05-01>.

² Administrative Procedures Act 5 U.S.C. §551-559,701-706.

³ *Community Financial Services Association of America, LTD and Consumer Service Alliance of Texas v. Consumer Financial Protection Bureau*, Case 1:18-cv-000295 (W.D. Tex.). This case is currently stayed as a result of pending agency rule proposals.

⁴Consumer Financial Protection Act §1031(b).

⁵ Consumer Financial Protection Act §1022(b)(2)



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the Bureau forward in producing a net positive to consumers and the financial services industry. Should you have any questions, please feel free to contact us at 1-800-486-2917.

Respectfully,

A handwritten signature in black ink, appearing to read "Paul L. Mercer".

Paul L. Mercer
President

A handwritten signature in black ink, appearing to read "Miriah Lee".

Miriah Lee
Regulatory Counsel



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